GAN CHING NYIN

v.

MAJLIS DAERAH SABAK BERNAM & ANOR

HIGH COURT MALAYA, SHAH ALAM
SURIYADI HALIM OMAR J
[CIVIL SUIT NO: MT1-22-72-98]
24 JANUARY 2005

CIVIL PROCEDURE: *Striking out - Application for - Application to strike out after hearing of preliminary question - No question or issue framed for court's determination - Application made under wrong provision - Whether application ought to be dismissed - Rules of the High Court 1980, O. 33 rr. 2, 5*

CIVIL PROCEDURE: *Trial - Preliminary issue to be tried - Procedure to be followed when such issue raised - Principles to be followed in determining such preliminary issue - Rules of the High Court 1980, O. 33 rr. 2, 5*

CIVIL PROCEDURE: *Parties - Representative capacity - Plaintiff represented all purchasers of houses in housing project - Plaintiff and others all having common interest, common grievance and seeking relief beneficial to all*

The defendants developed a certain housing project ('the project'). The purchasers of units in the project, claimed that their units were not constructed according to approved plans as a result of which their units suffered defects. The plaintiff was one such purchaser and brought a representative action against the defendants for breach of contract and negligence. The defendants applied to strike out the plaintiff's action pursuant to O. 33 r. 5 of the RHC 1980, and/or under the court's inherent jurisdiction. The application was dismissed by the SAR and the defendants appealed to the judge.

Held (dismissing the appeal):

[1] By virtue of O. 33 r. 2 RHC, a court may hear preliminary issues possibly affecting the main cause or matter and arising out of such cause or matter before, at or after the trial of such matter. When O. 33 r. 2 is invoked, procedurally the court must first identify the question, scrutinize and ventilate it before determining such question or preliminary issue. The court may thereafter dispose of the matter, or mete out such other necessary order reasonable in the circumstances of the case. (p 179 b-e)

[2] O. 33 r. 2 RHC is meant to avoid parties from protracted trials thereby saving costs. If O. 33 r. 2 RHC can effectively dispose of the main cause or matter, then recourse to it should be had. However the court should also be cautious in having recourse to such provision, especially where the hearing of preliminary issues would aggravate matters by a failure to resolve the main cause or matter. (p 179 f-h)

[3] On the facts, the application should be rejected since: (i) the application was wrongly made under O. 33 r. 5 when in fact it should have made under O. 33 r. 2; (ii) no question was supplied by the defendants thereby keeping the court in the dark as to the preliminary issue allegedly capable of disposing the matter or cause; (iii) the defendants did not even attempt to formulate their question; (iv) the defendants unsuccessfully argued that the representative action was wrong; (v) there were disagreements, obscurities and obvious uncertainties as to the facts.
(pp 180 b-g & 181 a-f)

Obiter:

[1] *Prima facie* the representative action was in order. The plaintiff and the others he represented were all purchasers of dwelling houses in the same housing project; they were affected by floods as a result of the defendants' non-adherence to approved plans; and the relief sought was beneficial to all of them. (p 180 e-g)

Case(s) referred to:

Abdul Rashid Abdul Majid v. Island Golf Properties Sdn Bhd [1989] 2 CLJ 1184; [1989] 1 CLJ (Rep) 205 ***(refd)***

Arab Malaysian Finance Bhd v. Meridien International Credit Corporation Ltd London [1993] 4 CLJ 307 ***(refd)***

Chan Kum Loong v. Hii Sui Eng [1980] 1 MLJ 313 ***(refd)***

Duke of Bedford v. Ellis [1901] AC 1 ***(refd)***

Everett v. Ribbands [1952] 2 QB 198 ***(refd)***

Florence Bailes v. Dr Ng Jit Leong [1983] 2 MLJ 175 ***(refd)***

Isaacs & Sons Ltd v. Cook [1925] 2 KB 391 ***(refd)***

Jet-Age Construction Sdn Bhd & Anor v. Module Construction Sdn Bhd & Ors [1995] 2 CLJ 261 ***(refd)***

Kumarasamy v. Revathy Development (M) Sdn Bhd [1995] 2 MLJ 586 ***(refd)***

Lim Hong Liang & Anor v Tan Kim Leng & Anor [1997] 4 CLJ 175 ***(refd)***

Norfolk and North American SS Co, Ltd v. Virginia Carolina Chemical [1913] AC 5 ***(refd)***

Pooley v. Driver [1877] 5 Ch D 458 ***(refd)***

Smith & Ors v. Cardiff Corporation [1954] 1 QB 214 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 33 rr. 2, 5

For the defendant - CK Tan; M/s KC Yap & Partners
For the plaintiff - S Selvarajah; M/s Azariah & Assocs

Reported by Andrew Christopher Simon

JUDGMENT

Suriyadi Halim Omar J:
The plaintiff respondent had purchased land in a housing project, situated at the Sabak Bernam District, with the intention of constructing his separate dwelling unit on it. As the State Government owned the land, and as agreed upon by both parties, it thus had the absolute right to appoint the first defendant as the developer, which it did. The latter subsequently appointed the second defendant to construct the infrastructure, including the plaintiff's dwelling unit. On completion the first defendant had accordingly issued the certificate of fitness.

The buyers of the dwelling units, amongst them the plaintiff, had complained that the second defendant had failed to construct the said dwelling units in accordance with the approved plans, the result of which were the appearance of defects. Being disgruntled they, despite having different factual differences, had subsequently taken up a representative action founded on a breach of contract and negligence, with the current named plaintiff standing in for them.

After the writ had been filed, the appellant defendant had filed an application pursuant to O. 33 r. 5 of the Rules of the High Court 1980, regretfully to be rejected by the relevant Senior Assistant Registrar. Being dissatisfied a notice of appeal was accordingly filed. I had heard that appeal subsequently, and after treating it as a rehearing, had similarly dismissed it. I now supply my grounds for that dismissal. The application was in the following format:

> DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM DALAM NEGERI SELANGOR DARUL EHSAN GUAMAN SIVIL NO. MT4-22-74-98
>
> ANTARA
>
> TAN BENG CHEE
>
> Mendakwa atas sifat wakil bagi pihaknya sendiri dan sembilan belas (19) orang lain yang memohon untuk remedi yang sama atas alasan-alasan yang sama terhadap

Defendan Pertama dan Kedua PLAINTIF-PLAINTIF

DAN

1. MAJLIS DAERAH SABAK BERNAM
2. PINGAT WARISAN SDN. BHD .DEFENDAN-DEFENDAN

(DISATUKAN MENURUT PERINTAH MAHKAMAH BERTARIKH 9HB. DISEMBER 1999)

SAMAN DALAM KAMAR

Benarkan semua pihak yang berkenaan hadir di hadapan Hakim dalam Kamar pada hari ..., pada haribulan .... 2002 pada 9.00 pagi untuk mendengar permohonan oleh Defendan Pertama dan Kedua untuk perintah seperti berikut:

(a) Tindakan Plaintif-Plaintif yang difailkan di sini terhadap Defendan Pertama dan Kedua dibatalkan menurut Aturan 33 kaedah 5 Kaedah-Kaedah Mahkamah Tinggi, 1980 dan/atau dibawah bidangkuasa Mahkamah yang sedia ada ("inherent jurisdiction");

(b) Kos permohonan ini dan kos tindakan ini ditaksirkan oleh Mahkamah dan ditanggung atau dibayar oleh Plaintif-Plaintif kepada Defendan Pertama dan Kedua;

dan

(c) Apa-apa relif atau perintah lain yang Mahkamah yang Mulia ini fikir adil dan wajar.

In a gist the appellant defendants had wanted the plaintiff's action against the respondent defendants be struck out pursuant to O. 33 r. 5 Rules of the High Court 1980 and/or under its inherent jurisdiction. During the hearing of the appeal the emphasis was inclined towards the former rule rather than the court's inherent discretionary power. I now reproduce the relevant sub-provisions under O. 33 Rules of the High Court 1980 that will take up much of the discussion, namely:

Rule 2 Time, etc.., of trial of questions or issue.

The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of facts and partly of law, and whether raised by the pleading or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

RULE 5 Dismissal of action, etc. after decision of preliminary issue.

> If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.

Generally speaking, when parties appear before the judge, say pursuant to O. 34 of the Rules of the High Court 1980, when conducting a pretrial management exercise, necessary directions may be given pursuant to O. 33 r. 2 of the Rules of the High Court. Under the latter provision the court may hear certain preliminary issues which arose from a cause or matter before the trial (as at the stage of O. 34), at or after the trial which may affect the main cause or matter. Notwithstanding the apparent liberal legislation certain procedures must be adopted so as to permit a court the opportunity to determine the issue which will in effect substantially dispose of the cause or matter. The disposal may have the effect of rendering a trial unnecessary. In brief the court must first identify the question. Naturally, in order to help the court, the manner, format or type of question will have to be scrutinized (*Florence Bailes v. Dr Ng Jit Leong* [1983] 2 MLJ 175). Needless to say, after its ventilation followed by the determination of the question or preliminary issue, the court may dispose of the matter, or mete out such other necessary order reasonable in the circumstances of the case (O. 33 r. 5 RHC 1980; Janab's Key to *Civil Procedure in Malaysia and Singapore; Malaysian High Court Practice* (1998 Desk Edition); *Lim Hong Liang & Anor v. Tan Kim Leng & Anor* [1997] 4 CLJ 175; *Abdul Rashid Abdul Majid v. Island Golf Properties Sdn Bhd* [1989] 2 CLJ 1184; [1989] 1 CLJ (Rep) 205.

Without splitting hairs, O. 33 r. 2 of the Rules of the High Court 1980 if adverted to, is supposedly meant to avert parties from agonizing and protracted long trials, followed by the saving of costs. Therefore if advertence to it will effectively dispose of the main cause or matter, then why not allude to it (*Pooley v. Driver* [1877] 5 Ch D 458; *Kumarasamy v. Revathy Development (M) Sdn Bhd* [1995] 2 MLJ 586; *Everett v. Ribbands* [1952] 2 QB 198). On the other hand, this supposed shortcut route may also be illusionary, as in the long term it may provoke more disservice to the course of justice. That being so, any court should be quite chary to such allusion if by hearing of such preliminary issues, matters are exacerbated by its very failure to resolve the main cause or matter (*Chan Kum Loong v. Hii Sui Eng* [1980] 1 MLJ 313).

Returning to the application proper, having heard the views of both parties, I had rejected the application as, *inter alia*:

1. the application painted a rather vague picture of the purpose. As starters the application was mistakenly made pursuant to O. 33 r. 5, which was actually an empowering provision meant to arm the court with powers to mete down the necessary orders, after hearing the preliminary issue. If at all the correct rule was r. 2 of O. 33;

2. apart from being at a loss as to correct provision, I was also totally in the dark as to the preliminary issue allegedly capable of disposing the matter or cause, as no question was supplied. It must be categorically stated that the question if any must be framed, and if need be an explanation supplied in the affidavit clarifying how the main cause or matter could be disposed in favour of the applicant by this manner. Naturally the applicant may also suggest or seek out other orders if outright dismissal of the cause of matter were not the theme of the application;

3. despite the broad hints dropped by the court and the opposing party, the appellant defendant never even attempted to formulate that all important question;

4. the appellants from the Bar table had persisted to ventilate the argument that a representative action was wrong in the circumstances of the case despite not supplying that reason in the summons-in-chamber (see above). The appellants had submitted that the intitulment format undertaken was flawed as the facts depended by the respective plaintiffs were different. I was not impressed by this argument as *prima facie* the representative action appeared in order. A cursory appraisal on the face of the record showed that the current named plaintiff could avail himself of the representative action, as the three conditions of having common interest amongst them, common grievance, and relief sought was of a nature beneficial to all of them, did exist. Undeniably they were purchasers of dwelling houses in the same housing project; they were affected by floods as a result of non-adherence to the approved plans; and incontrovertibly the reliefs sought were in a nature beneficial to all of them (O. 15 r. 12 RHC 1980; *Duke of Bedford v. Ellis* [1901] AC 1; *Smith & Ors v. Cardiff Corporation* [1954] 1 QB 214); and

5. the appellant had kept on harping on the facts despite the reality that there was no agreement as to the facts. There were more disagreements of the facts found in the sketchy affidavits rather than the reverse at this early but crucial stage. Ordinarily this provision, which is summary in its procedure and quite similar to O. 14A of the Rules of the High Court 1980, should not be resorted to if there were still obscurity of facts or law or both, and if really needed to be invoked, only if no further light could be thrown at the full trial (*Isaacs & Sons Ltd v. Cook* [1925] 2 KB 391; *Norfolk and North American SS Co, Ltd v. Virginia Carolina Chemical* [1913] AC 52). In fact where the issue on points of law involves the consideration of unresolved facts (see no. 4 above), then such application is inappropriate as it may be based on a purely hypothetical state of facts as in this case (*Arab Malaysian Finance Bhd v. Meridien International Credit Corporation Ltd London* [1993] 4 CLJ 307).

Apart from there being no valid application before me, especially as the summons-in-chambers had failed to set out the question to be determined properly, the uncertainties of facts were too obvious. The uncertainties, amongst others, were as follows:

1. was there failure to construct the project at 1.8 meters from sea level in accordance with the approved plans thus requiring the calling of experts;
2. was there generally a breach of contract;
3. was there any negligence on the part of the defendants;

   and

4. if there was non-compliance with the approved plans how could the certificate of fitness have been issued?

I therefore had considered that, with the facts still in dispute, a full trial would be the most apt forum to settle the matter, ie, after oral evidence and extrinsic evidence had been adduced (*Jet-Age Construction Sdn Bhd & Anor v. Module Construction Sdn Bhd & Ors* [1995] 2 CLJ 261). Aside from the above reasons, even if I were to proceed with the application and agree with the preliminary objection as regards the issue of representation, could I thereafter still safely say that the main cause or matter could be disposed of, despite agreeing with the applicant? Beset by all these confusion, I was more inclined to rule that the application here was inappropriate and hence had dismissed the application without much hesitation.